

## Memorandum 97-79

### Environmental Law Consolidation: Results of Request for Public Comment

This memorandum reviews comments we have received on the draft outline of a consolidated California Environmental Code (September 1997). A copy of the outline is attached for Commissioners.

We have received the following letters which are included in the Exhibit:

	<i>pp.</i>
1. David Johnson, Department of Boating and Waterways (Sept. 25, 1997) . . . . .	1
2. Gary A. Patton, Planning and Conservation League (Oct. 15, 1997) . . . . .	3
3. Nicole Tutt, Neumiller & Beardslee (Oct. 23, 1997) . . . . .	4
4. Professor Gregory Ogden, Pepperdine University (Nov. 5, 1997) . . . . .	5
5. Nicholas C. Yost, Sonnenshein Nath & Rosenthal; David Roe, Environmental Defense Fund (with attached material) (Nov. 5, 1997) . . . . .	6
6. Robert A. Ryan, Jr., California County Counsels' Association (Nov. 12, 1997) . . . . .	17
7. H. Jess Senecal, Association of California Water Agencies (Nov. 14, 1997) . . . . .	20
8. Marcia Grimm, California State Coastal Conservancy (Nov. 17, 1997) . . . . .	23
9. J. William Yeates (Nov. 19, 1997) . . . . .	26
10. Jeffrey S. Ross, Bar Association of San Francisco (Nov. 19, 1997) . . . . .	28
11. Ellen J. Garber, Jon F. Elliot, Executive Committee of the Environmental Law Section of the State Bar of California (Nov. 19, 1997) . . . . .	30
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## OVERVIEW

The reaction to the proposed consolidation of environmental statutes is mixed. About half of those who express an opinion on the desirability of the project feel that the overall effect would be beneficial. Opponents to the project raise a number of concerns, which can be generalized as follows: (1) There is no need for the project. (2) The negative consequences inherent in reorganization will outweigh any benefits. (3) The project entails significant risks of inadvertent policy changes. These concerns are discussed more fully below.

Commentators also suggest alternatives to the creation of a single consolidated code and make specific suggestions on how the proposed outline of a consolidated code can be improved. All commentators express at least some willingness to review and comment on future materials relating to this study.

### SUPPORT FOR CONSOLIDATED ENVIRONMENT CODE

The idea of consolidating environmental statutes into a single code is supported by Professor Gregory Ogden (a Commission consultant for administrative law), the San Francisco Bar Association, the Executive Committee of the Environmental Law Section of the State Bar (State Bar), the California Environmental Protection Agency (CalEPA), and the City Attorney of Long Beach. See Exhibit pp. 5, 28-29, 30-35, 44-48, 52. These commentators believe that consolidating environmental statutes into a single code will simplify access to environmental statutes and will identify and possibly correct inappropriately inconsistent, redundant, and obsolete provisions.

### OPPOSITION TO CONSOLIDATED ENVIRONMENT CODE

The idea of consolidating environmental statutes into a single code is opposed by the California County Counsels' Association, the Association of California Water Agencies, J. William Yeates, the Department of Fish and Game's Office of Oil Spill Prevention and Response (OSPR), and the California District Attorneys Association. See Exhibit pp. 17-19, 20-22, 26-27, 37-43, 49-51. Their objections are discussed below.

#### **Project Unnecessary**

A few commentators question the need for a comprehensive review and reorganization of environmental statutes.

The District Attorneys Association writes, at Exhibit p. 49: “Commercially available publications now exist which consolidate the statutes into a single volume, and able commentary exists that explains the interrelationships between the statutes.”

The County Counsels’ Association writes, at Exhibit p. 17:

[T]he CCA committee is not aware of major inconsistencies among “environmental” statutes nor is it aware that obsolescence or duplication is a problem in an area of law which, in large part, is of recent vintage. Further, nothing in the material of the Commission which has been made available to the public identifies a need to undertake [the consolidation project].

A similar sentiment is expressed by the Water Agencies Association at Exhibit pp. 20-21. The fact that these organizations, with clear expertise in their fields, are unaware of significant problems with the present organization of environmental statutes is useful information, but not conclusive. It is the Commission’s experience, with other major statutory consolidation projects, that close study of a body of law often reveals problems that were not immediately apparent at the outset.

Another concern expressed by commentators is the possibility that the Commission’s work would needlessly duplicate the recent work of the Governor’s Blue Ribbon Unified Environmental Statute Commission. See Exhibit pp. 6-16. This does not appear to be a problem. There are substantial differences between the work of the Blue Ribbon Commission and the Legislature’s charge to the Law Revision Commission. The Blue Ribbon Commission focused on substantive policy issues, such as the functional unification of administrative programs, e.g., multi-media pollution control and consolidated permitting procedures. They recommended that these ends be pursued through administrative and regulatory reforms, rather than statutory amendments. The Law Revision Commission, on the other hand, is charged with studying and recommending nonpolicy improvements to the organization of environmental statutes.

### **Negative Consequences**

A number of commentators believe that the broad reorganization of environmental statutes will have negative consequences and that these consequences will outweigh any benefits to be derived from reorganization. For

example, the County Counsels' Association (CCA) writes, at Exhibit p. 18: "The reorganization, together with inevitable language changes, will increase, not decrease, the complexity of a lawyer's tasks[.]" The Association of California Water Agencies (ACWA) writes, at Exhibit p. 20: "Such a broad reorganization would not make the codes more usable and accessible, as intended, but would result in greater confusion[.]"

Proponents of the project recognize the potential negative consequences but believe that these consequences will be outweighed in the long run by project benefits. For example, the California Environmental Protection Agency ("CalEPA") writes, at Exhibit p. 44:

[W]e believe that the inconvenience of renumbering existing statutes will eventually be outweighed by the long-term benefits of a consolidated and organized environmental code.

The issues discussed in this section relate to problems that are inherent in any substantial reorganization of statutory law:

*Effect on current practitioners.* Those who already practice environmental law have made an investment in learning the intricacies of the current statutory system. A large scale reorganization and renumbering will require practitioners to relearn the organizational aspects of this body of law and replace obsolete reference materials. See Exhibit pp. 18, 20-21, 24, 44. Reorganization would also require substantial conforming regulatory amendments by administrative agencies. See Exhibit p. 18.

*Cross-referencing required.* A large body of case law has developed interpreting environmental statutes. Application of this law to new sections will require a cross-reference to indicate the source of the new law. This complicates research in a way that will continue even after the new sections have become familiar to practitioners. See Exhibit pp. 18, 20-21, 26.

*Disruption of existing logical placement.* In some cases moving a section into a consolidated Environment Code will improve access to environmental law but will have some negative effect on the body of law from which it is drawn. The District Attorneys Association provides an example, at Exhibit p. 50:

Health and Safety Code Section 11374.5 provides penalties for the disposal of hazardous substances by a manufacturer of controlled substances, and provides specific directions where penalty monies should go to clean up environmental contamination. If this section were moved to a new environmental code, it would

no longer be grouped with statutes which criminalize drug manufacturing crimes, and could be missed by a prosecutor with limited training in environmental enforcement.

The Commission consultants recognize this point and recommend against breaking up integrated bodies of law such as the Revenue and Taxation Code (which contains various environmental tax and fee provisions). The difficulty will be in determining when the benefit of consolidating a section is outweighed by the cost of disrupting its existing placement.

This problem is exacerbated by the inherent difficulty in defining the conceptual limits of “environmental law.” By way of example, the California Coastal Conservancy notes, at Exhibit p. 25:

The possible exclusion of general land use planning and zoning statutes from other more specifically “environmental” provisions relevant to development projects would not appear to serve the purpose of making the body of law more accessible and usable. At the same time, as your outline discussion notes, this is an extensive body of law not exclusively “environmental” in character. This is a fairly obvious example of the difficult choices we think the consolidation project will face in numerous, small ways not so immediately apparent. It is difficult to assess in general, and in the abstract, what the consequences of either choice may be.

### **Risk of Inadvertent Policy Change**

The commentators have identified several situations where an apparent nonpolicy change could inadvertently result in a substantive policy change. These problems are discussed below:

*Changes in interpretive context.* As noted by the California Coastal Conservancy, at Exhibit p. 24:

The context in which a particular statute or group of statutes occurs is often important as an aid to interpretation; segregation of existing statutes into environmental and non-environmental categories, or in different subcategories within an environmental code, could have unintended consequences with respect to their understood meanings.

CalEPA provides an example of this problem, at Exhibit p. 48:

The context or placement of a statute may also affect its interpretation. For example whether a particular statute is categorized as a “water resource” statute or a “wetlands protection”

statute may influence how the courts interpret it, even if the two areas overlap.

Another example cited by CalEPA involves the question of applicable definitions. Reorganization may result in the aggregation of sections that were previously subject to different definitions. In such a case, the application of a general definition may be problematic. Any consolidation will need to be carried out with careful attention to the interpretive context of the sections to be moved.

*Changes in administrative jurisdiction.* Another concern, raised by several commentators, is the possibility that relocation of a section may fragment an agency's organic statute, inadvertently reassigning responsibility for enforcement or administration of that section to another agency. See Exhibit p. 32. An example of this is provided by the District Attorneys Association at Exhibit p. 50:

Section 5650 of the Fish and Game Code prohibits one from depositing, permitting to pass into, or placing where it can pass into waters of the state, any material deleterious to fish, plant life, or bird life. Moving this section to a consolidated water quality section of a proposed environmental code would immediately raise the question as to what agency would have primary enforcement jurisdiction. Would it be the Department of Fish and Game, which now has this authority, or would it fall to the State Water Resources Control Board, which enforces other significant water pollution statutes? The effect on environmental quality could be significant, since the Department of Fish and Game enforces a zero-tolerance pollution statute designed to protect sensitive fish and wildlife, whereas the Water Boards have historically been more concerned with balancing often competing "beneficial uses" of water resources, enforced through drinking water standards. Drinking water standards allow levels of chlorine which fish cannot tolerate.

Any consolidation will need to be carefully conducted in order to preserve existing agency responsibilities.

*Federal delegation requirements.* The State Bar notes, at Exhibit pp. 32-33:

A number of California's environmental quality statutes were either adopted or amended to allow California to be delegated authority by the United States Environmental Protection Agency to implement parallel federal statutes (e.g. Clean Air Act, Clean Water Act, hazardous waste statutes). One of the prerequisites of such delegation is that the state laws be structurally and semantically consistent with the federal environmental statutes and regulations.

Hence, numerous instances of fragmentation, overlap and inconsistency within state laws owe their existence to the structure and language of the parallel federal laws over which the State has no direct control. Some examples include different and inconsistent definitions of hazardous substance/hazardous material, and overlapping requirements for release prevention programs. Efforts to improve California's statutes could complicate, and might even endanger, the State's continued ability to maintain federal delegation.

Maintenance of federal delegation represents an important external constraint on the scope of any statutory reorganization.

*Inconsistency, redundancy, and obsolescence.* Several commentators caution the Commission against inappropriately "correcting" apparently inconsistent, redundant, or obsolete statutes. As discussed above, apparent defects of this kind may be an intentional accommodation to federal requirements. What's more, apparent inconsistencies may represent intentional policy compromises. The District Attorneys Association provides an example, at Exhibit pp. 50-51:

California's environmental statutes have been written piecemeal over a period exceeding one hundred years. One of the earliest, ... Section 5650 of the Fish and Game Code, was originally enacted in the 1870s. Its zero-tolerance for water-based pollutants is arguably inconsistent with other sections of the Water Code, CEQA, or provisions of the Forest Practices Act which, it can be argued, accept environmental degradation and pollution in varying degrees at various levels of mitigation. During the last full legislative session, SB 649 (Costa 1996), as initially proposed, would have required a prosecutor to demonstrate environmental harm before proceeding with a § 5650 prosecution. Proponents argued that statutes enacted since the 1870s adequately regulated polluters, and that the zero-tolerance provisions in § 5750 were either obsolete, unnecessary, or in conflict with other statutes. Proponents also argued that § 5650 was unfairly inconsistent with provisions in the Water Code and other codes which allow holders of permits to discharge pollutants into state waters. They proposed that those permit holders be exempt from § 5650's prohibitions. This hotly-debated and controversial measure passed with amendments, and was subsequently modified by AB 11 (Escutia 1997). This legislative process is a perfect example of the complexities involved in updating "obsolete" provisions and harmonizing seemingly inconsistent statutes. Fundamental policy decisions were implicated in what some initially characterized as an innocuous modernization of the Code.

CDAAs believe that many — and perhaps most — alignments and “modernizations” will necessarily involve policy choices in the form of options that either strengthen or loosen environmental protection, depending on which option is selected. These are policy choices which are legislative in nature, and should not be made by a committee. A comprehensive environmental statute will probably involve hundreds of such choices, making intelligent legislative debate on an entire package very difficult to achieve.

*Staff conclusion.* The concerns discussed in this section are serious ones. However, the staff believes that, in most cases, the Commission will either be able to distinguish on its own that a particular change has an effect on policy, or will be readily apprised of that fact by members of the public. Of course, considering the volume of material to be covered, there is some possibility that an inadvertent policy change could escape detection by the Commission and public commentators. These remaining issues could then be worked out in the legislative process. However, as the District Attorneys Association notes in the last paragraph quoted above, legislative scrutiny of every proposed change for inadvertent policy ramifications could substantially complicate legislative consideration of the Commission’s recommendation.

#### PROPOSED ALTERNATIVES

The commentators suggest a number of alternatives to the full consolidation of environmental statutes within a single code. These alternatives are discussed below.

##### **Limited Scope**

Some commentators are open to consolidation of environmental law into a single code so long as the scope of consolidation is limited in a specified way. For example, the Department of Health Services believes that consolidation may be beneficial so long as it does not affect any provisions of the Health and Safety Code. See Exhibit p. 36. The Water Agencies Association is opposed to consolidation, but is willing to consider consolidating “statutes directly impacting environmental protection” if “natural resource” statutes, such as those governing water resources, are excluded. See Exhibit pp. 21-22.

The Department of Health Services suggestion seems unworkable. If a consolidation of environmental law is to accomplish anything, it must include provisions of the Health and Safety Code. The Health and Safety Code contains a

substantial part of the laws that are clearly “environmental,” including most of those that address pollution control.

The Water Agencies Association suggestion is more tenable, as it turns on a conceptual distinction — environmental protection versus natural resource management. However, the boundaries of this concept would probably be as difficult to define as the limits of “environmental law.” For example, are laws governing drinking water standards environmental protection laws or natural resource laws? What’s more, it isn’t clear why consolidation would be beneficial in the context of environmental protection, but not in the context of natural resource management.

### **Consolidation Within Existing Codes**

A more limited alternative would be to consolidate distinct bodies of law within existing codes, without creating a new Environment Code. Under this approach, the Commission would narrowly target and reform specifically identified problem areas. For example, Mr. Yeates suggests the consolidation of laws relating to the California Environmental Quality Act. See Exhibit pp. 26-27. The Office of Oil Spill Prevention and Response proposes consolidating provisions relating to river and stream protection in the Fish and Game Code. See Exhibit p. 41-42.

This approach would certainly simplify the Commission’s task and would undoubtedly be beneficial in the areas examined. However, the overall benefits of large scale consolidation (simplification of access to a unified and organized body of law) would be absent.

### **Consistency Review of Existing Codes**

The County Counsels’ Association opposes the project in general, but might accept a review of environmental laws for the limited purpose of resolving inconsistencies. See Exhibit p. 19. Again, such a limited project would be beneficial, but would not achieve the benefits of consolidation.

### **Development of Reference Tools**

A few commentators endorse the idea of the development of reference tools, such as a comprehensive index of environmental laws, as an alternative to consolidation. See, e.g. Exhibit pp. 21-22, 33-34. This would have the benefit of improving access to environmental laws that are scattered throughout the various codes, without raising any of the problems discussed above. However, it isn’t

clear how such a proposal would be implemented. Would the Commission create the reference tools itself or recommend that another agency be charged with that responsibility? Who would have responsibility for maintaining these tools so that they remain current and accurate?

Another problem with this approach is that it would substantially duplicate, without necessarily improving upon, existing commercially available reference tools that already consolidate and explain the interrelationships between environmental laws. It isn't clear what additional benefit would be derived if the state were to produce similar tools.

#### SPECIFIC SUGGESTIONS FOR IMPLEMENTING A CONSOLIDATED ENVIRONMENT CODE

Several commentators make specific suggestions for the improvement of the Commission's proposed outline. These suggestions, which the staff has not analyzed in any detail, are set out below:

- The California Coastal Conservancy suggests that land use and conservation provisions relating to conservation easements, open space, and agricultural preservation should perhaps not be consolidated in the proposed Environmental Code, but rather be consolidated with other property provisions in the Civil Code. See Exhibit p. 25. Further, the Commission should consider consolidation of statutes relating to funding for parks, open space, and wildlife conservation. *Id.*
- Mr. Yeates proposes consolidating CEQA with the statutory exemptions to CEQA that are scattered throughout other codes. Furthermore, CEQA may be better placed in Division 8 (Land Use and Conservation), than in Division 1 (General). See Exhibit pp. 26-27.
- Some members of the San Francisco Bar Association suggest moving Division 7 (Solid and Hazardous Waste) to follow immediately after Division 4 (Toxic and Hazardous Substances). See Exhibit p. 29.
- The Office of Oil Spill Prevention and Response suggests that Division 1 (General) be reviewed with an eye toward clarifying that CalEPA and the Resources Agency are exclusively responsible for managing all environmental and natural resource agencies. Further, the provisions governing oil spill prevention and response should not be divided between Division 3 (Water Resources — Fish & Game Code §§ 5650-5655) and Division 4

(Toxic & Hazardous Substances — Lempert-Keene-Seestrand Oil Spill Prevention and Response Act, Gov't Code §§ 8574.1-8475.23, 8670.1-8670.72; Pub. Res. Code §§ 8750-8760.) See Exhibit pp. 41-43.

- CalEPA has set out a number of detailed suggestions for improvement of the outline. Some are drafting suggestions (not listed below), while others are more substantive: (1) Division 5 (Pesticides) should include specified sections from the Food and Agricultural Code, Business and Professions Code, and Health and Safety Code Section. (2) Division 7 should be divided into solid and hazardous waste components. (3) The solid waste section of Division 7 should include specified sections from the Public Resources Code. See Exhibit pp. 47-48.

#### COMMISSION ACTION

The Commission should now decide whether and how to proceed with this project. If the Commission agrees with the commentators who oppose the project in any form, it should report that decision and the basis for the decision to the Legislature. If, on the other hand, the Commission decides to proceed with some form of statutory review and consolidation, it should decide the scope and direction of the project.

Respectfully submitted,

Brian Hebert  
Staff Counsel

## DEPARTMENT OF BOATING AND WATERWAYS

1629 S STREET  
SACRAMENTO, CA 95814-7291  
(916) 445-6281



Law Revision Commission  
RECEIVED

OCT 01 1997

September 25, 1997

File: \_\_\_\_\_

Mr. Nathaniel Sterling  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

RE: Request for public comment on environmental law consolidation

Dear Mr. Sterling:

The Department of Boating and Waterways expresses no opinion on whether the project to consolidate the state's environmental laws is desirable. However, it does appear that a number of laws which affect the Department and navigable waterways will be included in the proposed consolidation.

Laws affecting waterways and the Department include the following:

**Harbors and Navigation Code:** Sections 30-88, 100, 110-115, 131-133, 268, 300-308, 406-86, 1720, 6302.5.

**Fish and Game Code:** Sections 5650-5652, 10502.8-10932.

**Government Code:** Sections 170, 53151-53158.

**Health and Safety Code:** Sections 4401-4433, 11837-11837.3, 24100.3, 25210.

**Public Resources Code:** Section 5002.6.

**Vehicle Code:** Section 1803, 9840-9928, 10550-10554, 21712, 23156, 40000.8.

**Water Code:** Sections 13900-13908.

To the extent the environmental law consolidation affects any of the above, the Department of Boating and Waterways would be willing to review drafts of the statutory consolidation.

In addition, the Department would like to be apprised of Law Revision Commission meetings at which the proposed environmental law consolidation project is discussed, and would like to receive agendas and background information for such meetings in advance. Notices and other materials should be sent until further notice to:

David Johnson  
Legislative Coordinator  
Department of Boating and Waterways  
1629 S Street  
Sacramento, CA 95814-7291

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "David Johnson". The signature is fluid and cursive, with the first name "David" being more prominent than the last name "Johnson".

David Johnson  
Legislative Coordinator

cc: Joy Fisher  
Chuck Raysbrook



PLANNING AND CONSERVATION LEAGUE

October 15, 1997

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OCT 21 1997

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California Law Revision Commission  
Attention: Nathaniel Sterling, Executive Secretary  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

RE: Environmental Law Consolidation

Dear Law Revision Commission:

In the Request for Public Comment you published in September 1997, you ask for comments on four different questions. I will try to provide substantive comments by November 21, 1997 but first want to review the various codes affected by the proposal.

I can let you know at this time, however, that I am willing to review drafts and otherwise assist in the preparation of a new code or in the statutory consolidation of the type contemplated (question four).

I would very much appreciate it if you would keep me informed as this ambitious project proceeds.

Thank you for your willingness to keep me informed.

Very truly yours,

Gary A. Patton, General Counsel  
Planning and Conservation League



*NICOLE A. TUTT*

October 23, 1997

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OCT 27 1997

File: \_\_\_\_\_

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**California Law Revision Commission**  
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MODESTO OFFICE:  
611 THIRTEENTH STREET  
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Re: Environmental Law Consolidation

Dear Ladies and Gentlemen:

I am in receipt of your memo of October 2, 1997, regarding the proposal to consolidate the environmental codes. I am currently an Associate Attorney with Neumiller & Beardslee in Stockton, with a practice focusing on water and environmental law, endangered species, and land use and development.

I would very much like to participate in the review process for drafts of the new Code, or otherwise assist in the preparation as necessary. Please add my name to your mailing list for continued information on the consolidation process, and advise me as to how I may be of assistance to the Commission with regard to this project.

Sincerely,

NICOLE A. TUTT  
Attorney-at-Law

NAT:ect



# PEPPERDINE

PEPPERDINE UNIVERSITY SCHOOL OF LAW

November 5, 1997

Law Revision Commission  
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Executive Director Nat Sterling  
California Law Revision Commission  
4000 Middlefield Road, ROOM D-1  
Palo Alto, CA 94303-4739

NOV 05 1997

File: \_\_\_\_\_

Re: Request for Public Comment on Environmental Law Consolidation, #E-100  
September 1997

Dear Nat:

I have read the supporting materials, including the draft outline of a proposed California Environmental Code, contained in the request for public comment on environmental law consolidation, #E-100. I support the project idea, to reorganize California environmental quality and natural resources statutes, through simplification and consolidation of existing statutes into a California Environmental Code. The consolidation project is desirable for many reasons. First, it is very helpful to regulators, lawyers, and judges, and members of the public interested in environmental law related issues, to have easy access to a well organized coherent body of law in one code, even if it is a large code. A consolidated code would offer that opportunity. Second, the field of environmental law has developed rapidly in the last 30 years, and a consolidation project could identify conflicts or inconsistencies that could be addressed through this project. Finally, this project could identify obsolete statutes, and could make existing statutes more discoverable.

While statutes could be consolidated within existing codes, the idea of a comprehensive environmental code is a preferable alternative because of the complexity of these laws, and the sheer number and variety of statutes regulating various topics in this body of law. I like the proposed topical organization, breaking down the statutes into fourteen divisions that are subject oriented. I would be willing to review drafts, and/or assist in preparation work, from an administrative law perspective.

Very Truly Yours,

Gregory L. Ogden  
Professor of Law

SONNENSCHN NATH & ROSENTHAL

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November 5, 1997

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Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Re: Proposed Project on Environmental Law Consolidation - Comments

Dear Mr. Sterling and Members of the Commission:

We write in response to your request for public comments on the above. In May 1994, Governor Wilson authorized the appointment of a Blue Ribbon Commission to study and report back to him on the potential unification of California's environmental laws. We were both appointed members of that commission and each of us chaired an active subcommittee.

The Governor's Commission addressed issues similar, if not identical, to those raised in your request for public comment and in the "Environmental Law Consolidation" document that accompanies it (although the mandate of the Governor's Commission, unlike that of the Law Review Commission, did include policy changes). Created at the instance of then-Secretary of Cal-EPA James Strock, the commission was co-chaired by former U.S. EPA Administrator William Reilly and Michael Traynor, former Chairman and President of the Sierra Club Legal Defense Fund.

A copy of the summary of the commission's report is enclosed, with the full commission membership listed. (The full report is a thick volume which can be obtained from Cal-EPA.) The Commission's findings are well summarized in the four "Conclusions" on pages 1-5 of the Introduction & Summary document.

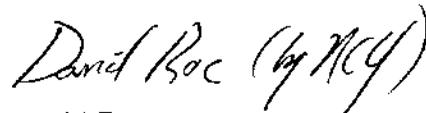
Nathaniel Sterling  
November 5, 1997  
Page 2

We would be happy to provide further information to you on this subject before you undertake a parallel inquiry, and we are sure other members of the Governor's Commission would be as well.

Yours sincerely,



Nicholas C. Yost  
Partner  
Sonnenschein Nath & Rosenthal



David Roe  
Senior Attorney  
Environmental Defense Fund

NCY:mag

Encl.

cc: John Dwyer (w/enc.)  
Brian Gray (w/enc.)

# REPORT OF THE COMMISSION

## Rationale for Unification

*Conclusion 1: Although California's system of environmental regulation is strong in many respects, it can be improved. The total pollution burden is not, under the present structure, the responsibility of any one entity. The Commission supports the general principle of unification as a means to provide a more consistent, effective, and less costly means of identifying and attaining the environmental standards. Achievement of California's environmental goals can best be furthered by a unified approach including: (1) more unified administration of the State's environmental statutes; (2) changes where needed in regulations to improve unified administration; and (3) to the extent the first two measures are insufficient, statutory changes where needed to achieve unification.*

The statutes that form the basis for the existing environmental regulatory system were enacted at different times and regulate separate pollutants or different environmental problems. Coordination among these statutes now occurs through a variety of organizational, statutory, and ad hoc means. At least in part as a result of this situation, the existing regulatory system in California is unnecessarily complex, expensive, and slow. The same or better environmental results could be achieved more quickly, more predictably, more fairly, and with less cost.

California's environmental laws, as with the federal statutes, have evolved individually over the last several decades, and have generally focussed on specific media (for example, air, water, hazardous wastes), facility types, or immediate environmental problems. This body of laws has produced progress in cleaning and protecting our environment during a time of pronounced population growth. But the structure of these laws is not necessarily the most cost-effective framework for maintaining progress, does not present a clear picture to the public and regulated community on what is needed for compliance, and does not necessarily contain the most effective structure for meeting California's environmental needs in the coming century. Single medium approaches fail to address the environment as a whole, allowing problems to be ignored or pushed to another medium rather than faced and solved.

The Commission is in general agreement on the need for a unified approach in the application of California's environmental laws. The rationale for a unified approach is set forth in the report of the Brass Ring Subcommittee (Appendix A), which was approved by the Commission. Among the key findings:

- The existing fragmented system makes it difficult to set rational priorities among different environmental challenges or even to examine alternative control measures to meet a specified need.

- Pollution control technologies should be directed at the actual control of pollution, which a multi-media approach may enhance. Currently, many such technologies used to meet regulatory requirements inadvertently transfer pollution from one medium to another, or change its form, or simply delay its release into the environment. Two examples are: (1) incineration that can destroy solid or hazardous waste but may generate air pollutants which are commonly controlled with scrubbers which, in turn, transfer the contaminants into the scrubber water; and (2) pretreatment of industrial wastewater that keeps contaminants out of the sewage treatment plant, but may concentrate the contaminants into a more toxic loading of solid or hazardous waste. Pollution prevention aimed at reducing the production of the wastes can avoid these unintended results.
- Pollution prevention is inherently multi-media, and the current single medium-oriented system is, in many cases, a basic impediment to implementing systematic prevention strategies.
- There is considerable evidence that in certain cases an integrated approach would not only be more effective in protecting environmental quality but also would reduce the cost of pollution control.
- An integrated approach to many existing environmental problems will facilitate the solution of environmental problems.
- A unified approach will facilitate the anticipation or identification and the resolution of new environmental problems as they arise.
- Accountability and simplicity are needed. Regulation by overlapping and multiple agencies can lead to unpredictability, duplication of effort, and inconsistent enforcement at additional cost.

*Conclusion 2: In many cases, unification of the regulatory structure is available through administrative action. Such changes can achieve many of the benefits of unification more quickly under existing statutes, than amending the statutes themselves.*

In the course of the Commission's deliberations, it has become clear that many actions may be taken administratively while some will require legislative action. Continued pursuit of the goal will require careful attention to differentiating between the two. However, the Commission concluded that administrative improvements offer more immediate means to instill a unified approach in the application of the environmental statutes:

- Administrative tools such as electronic information, guidance documents, unified regulations, and facility permits provide means to translate current statutes into more simplified and unified terms. In many cases, these tools are being used and can be applied further to achieve a unified approach where it makes sense.
- The goals of a unified approach should include a shift from pollution control to pollution prevention, a shift from single medium to multi-media solutions when dealing with activities that affect different parts of the environment, attainment of the standards through simpler and more cost-effective means, reduction in complexity, and greater accountability for performance under the standards -- by the agencies in setting a consistent set of rules and by the regulated community in meeting the performance goals under the standards. Working out specific changes to meet each of these goals will often entail considerable investigation which in many cases should first be demonstrated through administrative efforts, to be followed later where necessary with statutory changes to reflect what works in the field.
- Various Cal/EPA programs now have considerable flexibility to allow unified approaches to be crafted administratively, either for areas of the statute as a whole or through pilot programs authorized by statute in such areas as monitoring data, facility permits, site remediation, and inspections. In these cases, unification should proceed administratively, to be followed as necessary by statutory revisions.
- Federal requirements constrain full unification of the State's environmental laws.<sup>1</sup> Greater flexibility pursuant to federal regulations and delegation/authorization agreements will be required to implement certain changes on the state level.

Accordingly, unification should first be pursued administratively, to the extent possible. Administrative initiatives can be implemented more expeditiously than statutory amendments, and can also serve to test the limits of statutory flexibility and expose areas where changes in law are required. Certain areas of the statutes, however, may only be addressed through legislative changes.

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<sup>1</sup>Federal environmental statutes generally provide for delegation of implementation to the states, often including many specific requirements. Cal/EPA and the U.S. Environmental Protection Agency (U.S. EPA), Region IX, are preparing agreements to provide greater flexibility and unification of shared program responsibilities. Several national groups are considering unification of federal environmental laws, including the National Environmental Policy Institute, and the Commission on Enterprise for the Environment of the Center for Strategic and International Studies.

## Principles for Unification

*Conclusion 3: The benefits of unification are in many cases immediately achievable through administrative actions. To the extent, however, that legislative change is determined to be necessary, this process can be facilitated by establishing a set of consistent principles to help guide the development of future legislative proposals to amend, add to, recodify, or consolidate existing statutes.*

The Commission recommends the following principles to help guide the development of future legislation. To the extent future legislation conforms to the following, a more unified statutory structure will emerge over time as individual parts of the statute are changed:

- A more consistent format for the environmental statutes should be established, organized along functional lines (e.g., definitions, standards, permits, fees, violations, monitoring requirements). Aside from making the statutes more readable, this consistency can facilitate administrative consolidation of the different requirements functionally as well.
- The core environmental standards should be clearly specified, with defined accountability for their attainment. Individual programs and statutory requirements should then be linked to the different standards they affect.
- Lines of responsibility should be clearly defined. For state agencies, the lead agency concepts embodied in recent reforms such as the Unified Hazardous Materials Program SB 1082 (Calderon, Chapter 418, Statutes of 1993), Consolidated Permit Agency Process SB 1185 (Bergeson, Chapter 419, Statutes of 1993), Site Remediation Reform AB 2061 (Umberg, Chapter 1184, Statutes of 1993), and Governor-designated Lead Agency SB 297 (Campbell, Chapter 650, Statutes of 1995) should be reflected in program areas involving multiple agencies. Either state or local agencies -- and not both -- should be designated as the lead implementing agencies for specific program areas.
- For programs implemented at the local level, consistent procedures for state certification and oversight should be established to replace the multiple provisions now in place.
- For specified functional areas -- e.g., permitting, inspections, enforcement provisions, monitoring and reporting -- consistent procedures should be established either as a single requirement (e.g., a single electronic reporting protocol), or as "tiered" requirements (e.g., major and minor permits; Class I, II, or III violations) to be referenced in the specific statutory sections.
- Risk assessment procedures should be standardized and made consistent in their application.

- New reporting, data, and planning requirements should be consolidated for the responsible entity (i.e., agency or regulated entity), in order to flag potential duplications or opportunities to use existing procedures.
- Consideration for proposed new requirements should include the following:
  - Do the requirements enhance environmental protection?
  - Are the requirements cost-effective?
  - Do the requirements set performance standards rather than prescribe specific measures?
  - Are there incentives for compliance?
  - Do the requirements control/prevent pollution rather than shift pollution to another environmental medium?
  - Does the proposal foster pollution prevention as distinguished from perpetuating a pollution control/remediation approach?
  - Are the overall compliance costs faced by business and local government reduced?
  - Do the requirements foster accountability and simplicity?

## **Elements for Effective Unification**

*Conclusion 4: The Commission has identified several areas that lend themselves particularly well to administrative, regulatory, and legislative action to achieve a more unified approach.*

The recommendations summarized below in many cases call for proceeding under existing authority available to the Cal/EPA programs. The Commission has benefitted from its review of the progress made in California over the past several years to move the administration of environmental statutes towards a unified approach. These efforts have included systematic reform and the establishment of pilot programs that likely will lead to further changes towards this goal. The recommendations in several areas call for first establishing the benefits of unification through pilots and other demonstrations.

**Information.** Because some environmental regulation is necessarily complex, it is important that full information be widely available as to what the laws and regulations provide and what

information affected businesses and industries must submit to governmental agencies. Although information will continue to be sent and received on paper and in publications, the wider use of electronic communication offers immediate means to unify environmental data whether or not statutes are revised. Electronic systems can also be used to simplify and consolidate transmittal of monitoring, reporting, and other data required by the agencies from regulated facilities. Improvements in information flow will not cure underlying defects in regulatory requirements that are needlessly complex, ambiguous, or inconsistent, or which result from the layering of state and federal law, but they can reduce the difficulty of managing these defects. They can make it easier for all parties to identify such defects and isolate them, thus serving as a steppingstone to potential solutions. Specific recommendations for further actions include:

- a. **Open Access to Environmental Information.** Environmental information should be widely and clearly available, in the interest of fairness and public access. Cal/EPA should continue its administrative efforts to provide consolidated information on environmental regulations, guidelines, data, etc., electronically such as through the Cal/EPA website. Cal/EPA should also facilitate electronic access to monitoring and reporting data, including real-time monitoring of pollutants.
- b. **Legislative Support.** Legislation should be developed to set forth the conditions under which users and agencies should be entitled to rely on electronically retrieved information.
- c. **Data Standardization and Electronic Reporting.** Cal/EPA should continue to develop and implement standards for electronic reporting through the Consolidated Unified Program Agency (CUPA) and the Electronic Reporting Pilot Program AB 3537 (Sher, Chapter 1112, Statutes of 1994) in order to demonstrate the effectiveness of electronic reporting for both business and government.
- d. **Conference on Environmental Information.** Cal/EPA should convene a conference to further determine policy recommendations on the increased use of electronic information for access to and reporting of environmental information.

**Regulation.** A number of initiatives have been taken or are underway to assure greater coordination in environmental quality plans, regulations, and permitting processes. Cal/EPA efforts should continue to identify means to standardize, ensure greater consistency, and consolidate requirements at the facility level. Specific recommendations include:

- e. **Environmental Plans.** Greater conformity between the environmental plans should be administratively sought through early coordination among the agencies. For example, Cal/EPA has favored the use of standardized permits (e.g., general permits, permit by rule, equipment certifications) with a view towards providing more certainty to the public and regulated community in the permit process, thereby reducing the need to coordinate

individual permit decisions and ensuring greater consistency in the application of the environmental regulations. Most Cal/EPA programs now have such authority. The Legislature recently expanded this authority, by enacting General Permitting/Equipment Certification AB 1943 (Bordonaro, Chapter 367, Statutes of 1996) which authorizes State or local permitting agencies to adopt general permits for similar activities in lieu of individual permits.<sup>2</sup>

- f. **Local Consistency.** Cal/EPA should develop model ordinances for voluntary adoption by local and regional environmental agencies. Model ordinances could be applied more broadly to ensure greater administrative consistency in the application of environmental laws throughout the State.
- g. **Regulatory Review.** Cal/EPA should continue reviewing the environmental regulations to identify opportunities for simplification and consolidation.

**Compliance.** Inspections and enforcement activities are now undertaken by a broad range of state, regional, and local agencies. (The varied and potentially inconsistent regulations and statutes as well as the differing interpretations can add to the costs of compliance and regulatory uncertainty.) Specific recommendations include the following, which can be pursued by Cal/EPA separately as well as comprehensively through the Permit Consolidation Zones Pilot Program SB 1299 (Peace, Chapter 872, Statutes of 1995) requirements for coordinating compliance and inspection provisions:

- h. **Personnel Cross-training.** Administrative actions should be taken to expand cross-training of inspection and enforcement personnel.
- i. **Integrated Cal/EPA Inspections and Enforcement.** Cal/EPA should continue to pursue integrated agency enforcement actions that simultaneously identify environmental problems resulting from a given violation and the remediation of those problems.
- j. **Enforcement Consistency.** For programs delegated to local agencies, the state, federal and local agencies should set policies that result in consistency in definitions, procedures, and enforcement mechanisms.
- k. **Consistent Enforcement Tools.** The environmental statutes vary considerably in their enforcement tools, penalty provisions, and enforcement procedures. (A compilation of differences in the environmental quality statutes is contained in Appendix C). Although the Commission has not prepared draft language; future legislation should be considered to bring more consistency in this area.

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<sup>2</sup>AB 1943 was not considered by the Commission.

**Pollution Prevention.** There are few provisions in existing law directly applicable to pollution prevention as a separate concept. Pollution prevention should be a general ethic of a unified approach. Indeed, one rationale for a unified approach is that its logic leads inexorably to pollution prevention. Specific recommendations include:

- l. A pilot program involving only those regulated plants and industries who volunteer to participate. The goal of the pilot program will be to determine whether a multi-year, all-media, all-pollutants environmental plan can achieve savings in time and money to both the regulated and the regulators and can meet or exceed current environmental standards. The specifics of the proposed pilot program are set out in Appendix B.
- m. The same type of approach described in (l) above and in Appendix B should be pursued by enforcement personnel in selected enforcement actions that are appropriate for the multi-year, all-media, all-pollutants unified approach. The involvement of the regulated plant or industry will not be voluntary (because it is an enforcement action) but the early involvement of a company's own environmental personnel should be sought and encouraged.

**Risk Assessment and Risk Communication.** Soon after the Risk Assessment subcommittee began discussing its mission it realized that the Office of Environmental Health Hazard Assessment (OEHHA) was in the process of assembling a group of experts in California to look into risk assessment practices. Specifically, in 1993 the California Legislature passed a law which mandated that OEHHA convene an advisory committee to review the risk assessment activities of Cal/EPA. The focus of this review has been to make recommendations to the Director of OEHHA whether or not changes are needed to ensure that the State's policies, methods and guidelines for the identification and assessment of chemical toxicity are based on good science. The review includes the appropriateness of differences in policies, methods and procedures employed by the National Academy of Sciences, U.S. EPA, and other similar bodies. This group concluded its work in the Fall of 1996.

Because this work was being undertaken at the same time that the subcommittee was looking into risk assessment practices, the subcommittee decided to focus its efforts on the problems inherent in current risk assessments and risk communication practices at the state and local levels.

- n. Because consistency in risk assessment procedures is already being reviewed comprehensively, the Commission has not made any specific recommendations in this area. However, without endorsing any specific findings, the Commission recommends careful consideration be given to the results of the OEHHA advisory committee.

**Overlap.** Reduction of statutory overlap is an objective of many of the previous recommendations.

- o. The Commission is concerned about regulatory and statutory overlap. Efforts to reduce such overlap include but are not limited to Cal/EPA's industry-specific task forces created specifically to identify and reduce instances of overlap.
- p. Emergency Prevention and Response. An evaluation should be completed of overlapping authorities among the state agencies responsible for emergency prevention and response. Legislative action likely will be needed to implement any recommendations.

**Organization.** While a great many state, regional, and local agencies implement environmental laws, unification and consistency in the application of the laws can be pursued through means that do not entail time-consuming and politically controversial organizational change. Specific recommendations include:

- q. Statewide Consistency. Various administrative actions can be used to establish greater consistency in the application of the statutes, such as standardized guidance documents developed by the state agencies and local agency organizations.
- r. Fee Reform. Cal/EPA is currently developing fee reform proposals for some of its agencies. This effort should be broadened where possible to simplify and consolidate fees in order to reduce administrative costs and provide more flexibility in program priorities.
- s. Federal Reforms. Cal/EPA should pursue program flexibility in the federal statutes to reflect a unified approach at the state level.



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November 12, 1997

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California Law Revision Commission  
4000 Middlefield Road, Room D-1  
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Re: Environmental Law Consolidation

File: \_\_\_\_\_

Dear Commissioners:

In response to your September, 1997, request for comments upon a project to consolidate California's environmental laws, the California County Counsels' Association (CCA) has created a committee to monitor and comment upon this effort. This letter is to apprise you of that committee's general concerns as well as to respond to the specific inquiries posed by your September communication.

In your summary, you state that "The Legislature has directed the California Law Revision Commission ("Commission") to propose a reorganization of California's environmental quality and natural resources statutes." However, SCR 3 (Stats. 1997, res. ch. 102) is a threshold request of

"Whether the laws within various codes relating to environmental quality and natural resources should be reorganized in order to simplify and consolidate relevant statutes, resolve inconsistencies between the statutes, and eliminate obsolete and unnecessarily duplicative statutes."

In keeping with this threshold inquiry, the CCA committee is not aware of major inconsistencies among "environmental" statutes nor is it aware that obsolescence or duplication is a problem in an area of law which, in large part, is of recent vintage. Further, nothing in the material of the Commission which has been made available to the public identifies a need to undertake a project of the scope outlined in your September, 1997, communication.

With this general concern, the CCA committee offers the following, specific responses to the Commission's requests for comments:

**1. Is the project to consolidate the state's environmental laws desirable?**

The CCA committee does not believe that this project is desirable. Large bodies of case law have developed within discrete areas of what the Commission's staff have identified as "environmental" laws. The reorganization, together with inevitable language changes, will increase, not decrease, the complexity of a lawyer's tasks in these fields.

Additionally, many of the statutes involved in this project are implemented through regulations promulgated by different state agencies. Regulatory revisions necessitated by a reorganization of the scope proposed would aggravate the complexities of the statutory changes.

While the Commission's intent is to avoid policy revisions, the subject matter has historically been subject to special interest pressures. It is difficult to foresee an outcome that is free from such influence.

**2. Is the concept of a comprehensive Environmental Code sound?**

The concept relies upon a determination that there is a substantive connection between and among those statutes identified as "environmental" and that their compilation will ease the search for related topics. In fact, the umbrella is too broad.

For example, there is no technical relationship between statutes governing the handling of hazardous materials and those governing endangered species.<sup>1</sup> Indeed, it is logical to assume that the former would be found within a code dealing with health and safety while the latter would be found within a code dealing with fish and game.

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<sup>1</sup>There may be project specific instances in which both sets of statutes are applied. However, the intent and protections of both are significantly different and those differences are not alleviated by placing both series of statutes in one code.

Therefore, we do not believe that the creation of a comprehensive Environmental Code is sound. It may, in fact, obfuscate logical placement of disparate regulatory schemes.

To the extent that an alternative project is desired, a limited consistency review may be appropriate. To the extent inconsistencies can be identified, those can be eliminated without massive statutory reorganization.

**3. Are the organization and contents of the Environmental Code as outlined correct?**

Given the CCA committee response to inquiries one and two, it is apparent that we do not believe the organization, on a fundamental basis, to be correct. The project is premised that any statutes dealing with air, land, water and wildlife are so logically related to be placed within one code. In fact, such inter-relationship is, in most instances, tenuous at best.

**4. Are you willing to review drafts or otherwise assist in the preparation of a new code or statutory consolidation of this type?**

Should the Commission receive direction or otherwise determine to undertake this project, the CCA, through its Executive Director and assigned committee, is willing to assist the Commission.

Thank you for the opportunity to respond regarding the initiation of this project.

Sincerely,



ROBERT A. RYAN, JR.  
County Counsel

cc: Ms. Ruth Sorensen

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November 14, 1997

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Mr. Nathaniel Sterling, Executive Secretary  
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File: \_\_\_\_\_

**Re: Association of California Water Agencies -  
Comment on Proposed Environmental Law Consolidation**

Dear Mr. Sterling:

This letter sets forth the Association of California Water Agencies' response to the Law Revision Commission's request for public comment dated September 18, 1997 with respect to the proposed environmental law consolidation. For the reasons discussed more fully below, the Association of California Water Agencies (ACWA) opposes the proposed consolidation and instead recommends that efforts be concentrated in improving statutory cross-references and in publishing a comprehensive reference guide that would accomplish what the proposed consolidation contemplates.

As stated in the Law Revision Commission's comments regarding the outline of the proposed code, "no particular organization (including the status quo) is perfect." That statement certainly is true of the proposed reorganization, which is far too broad. The proposed reorganization impacts too many areas of substantive law governing natural resources by removing such statutes from their current codes and placing them in the proposed new code. Such a broad reorganization would not make the codes more usable and accessible, as intended, but would result in greater confusion by removing statutes which "fit" well in their current statutory locations. The proposed relocation of many of the water-related statutes (i.e., statutes concerning water rights, water compacts, dams and reservoirs, wells, pumping plants and water conveyances, flood control, development of state water resources and recreation) from the Water Code provides a clear example of this potential problem.

Over the years, practitioners have grown accustomed to the present statutory scheme and a substantial body of case law has developed interpreting the existing environmental and natural resource laws. The proposed statutory reorganization would likely result in great confusion with respect to the application of case authorities to the relocated statutes. The reorganization itself would create this problem with respect to the additional cross-referencing that would be required

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respect to the application of case authorities to the relocated statutes. The reorganization itself would create this problem with respect to the additional cross-referencing that would be required as a result of the statutory relocations.

Furthermore, history has shown that statutory consolidation efforts open the door to substantive law changes, whether intentional or inadvertent. There may be substantial differences of opinion as to what are considered to be statutory inconsistencies and how they should be resolved. Similar problems could occur with respect to whether given statutes are obsolete or duplicative and the extent to which such statutes should be eliminated.

In addition to the foregoing problems which would directly arise from the consolidation, several practical problems would result. The proposed consolidation would render virtually all present California environmental reference materials obsolete. This would result in a significant cost to California attorneys to acquire new and updated source and reference materials.

In short, it is ACWA's opinion that any shortcomings in the present organization of California's environmental and natural resources statutes do not justify the proposed revamping. Plainly stated, "if it ain't broke, don't fix it."

ACWA proposes two alternatives to the project described in the Law Revision Commission's materials. The first alternative is to leave the statutory scheme as it currently exists, but to focus on improving cross-referencing between related statutes, both those located in the same code and those located in different codes. This alternative includes the publication of a comprehensive reference guide, which could be based upon the outline prepared by the Law Revision Commission (similarly, an unannotated source book of the present environmental statutes could be developed based upon the structure set forth in that outline). The advantage to this approach is that it reduces the potential for confusion that exists with the proposed consolidation, while accomplishing the goal of making the statutes more usable and accessible.

The second alternative is recommended if Law Revision Commission concludes there is a consensus to proceed with the consolidation project. This alternative would be a much more limited reorganization of the truly environmental protection statutes. The more limited approach would consolidate in one code statutes directly impacting environmental protection which are presently scattered throughout several codes. Those statutes (with references to the Law Revision Commission's proposed outline) include CEQA (Division 1, Article 6) and statutes pertaining to air quality (Division 2), hazardous materials (Division 4), pesticides (Division 5), radiation (Division 6), solid and hazardous waste (Division 7), coastal, estuary and riparian management (Division 9) and noise pollution (Division 14). It is also possible that statutes

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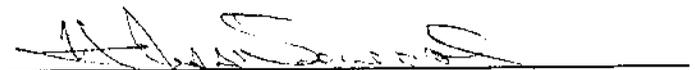
governing water quality and drinking water standards, as well as certain portions of other subject areas listed in the Law Revision Commission's outline, could be included in the consolidated code.

However, the bulk of the "natural resources" statutes that are proposed to be moved to the new code should remain in their present codes. The Water Code provisions discussed above are an example of such "natural resources" statutes that should remain in their current code. Other subjects that definitely should remain in their current statutory location are the planning and land use statutes, which should remain in the Government Code, and wildlife protection statutes, which should remain in the Fish and Game Code.

Even this limited approach, however, entails certain subjective judgments which would likely result in some controversy. Thus, it is ACWA's opinion that the reorganization not proceed at all, but that the Commission's resources be utilized to improve the statutes in their current locations.

Thank you for the opportunity to present this opinion. Please contact Bob Reeb, ACWA's State Legislative Director, at (916) 441-4545 if you desire additional input concerning this matter.

Very truly yours,

  
H. Jess Senecal,  
Chairman, ACWA State Legislative Committee

HJS/jc

cc: Mr. Bob Reeb, ACWA State Legislative Director  
Robert B. Maddow, Esq., Chairman, ACWA Legal Affairs Committee  
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November 17, 1997

Nathaniel Sterling, Executive Secretary  
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Re: Request for Public Comment  
Environmental Law Consolidation

Dear Mr. Sterling:

Staff of the Coastal Conservancy have reviewed with interest your September 1997 request for public comment on a proposal to reorganize and consolidate California's environmental statutes. The Coastal Conservancy is an agency within the Resources Agency whose powers and authorities are currently set forth in Division 21 of the Public Resources Code but whose activities are affected or governed in part by a variety of other environmental statutes such as the California Coastal Act, McAtter-Petris (San Francisco Bay Conservation and Development Commission) Act, California Environmental Quality Act, and various funding statutes (e.g., bond statutes codified in the Public Resources and Fish and Game Codes). Any revision of these statutes would have direct implications for the Conservancy's operations, and we would very much like to keep informed of the project as it develops. We also believe that the collective knowledge and experience of our project and legal staff, in developing and implementing environmental resource protection projects in cooperation with federal, local, and state agencies as well as private nonprofit organizations, citizens groups, and other private interests over the past twenty years could be a valuable resource for this undertaking. Whether, and in what ways, this is so depends in part on the direction the project may take and the specific revisions to be considered.

Based on a preliminary review of the September 1997 outline and request for comment, our response to the questions posed are as follows:

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(1) Is the project to consolidate the state's environmental laws desirable?

While we believe the goal of making existing statutes more usable and accessible is generally worthwhile, the materials provided do not make clear precisely what problems, if any, the proposed consolidation would address. As your question points out, statutory consolidation will require substantial renumbering of essentially all existing environmental statutes, and may create new problems unless very carefully drafted. It would be useful to identify the specific benefits to be achieved (or problems avoided) through the consolidation project, so as to weigh them against these disadvantages or inconveniences.

We are also concerned about the possible elimination of "obsolete and duplicative" statutes. How is this status determined?

(2) Is the concept of a comprehensive Environmental Code sound?

The possible fragmentation of existing organic statutes into environmental and non-environmental components, or in different divisions of a new Environmental Code, is a matter of some concern. For example, the outline posits that some provisions of the Fish and Game Code be included in a division relating to coastal, estuarine and riparian management, while others be categorized under a new wildlife protection division. Without judging whether or how this reorganization would affect operations of the Department of Fish and Game, we note that the Coastal Conservancy's functions could be similarly divided between divisions pertaining to coastal, estuarine and riparian management (as currently proposed) and those governing parks, wilderness and public lands, or perhaps others. Similar fragmentation could result from the separation of administrative from substantive provisions of law. The context in which a particular statute or group of statutes occurs is often important as an aid to interpretation; segregation of existing statutes into environmental and non-environmental categories, or in different subcategories within an environmental code, could have unintended consequences with respect to their understood meanings. In general, any consolidation effort should avoid these results unless clearly justified.

(3) Are the organization and contents of the Environmental Code as outlined correct? Should specific categories or statutes be included or excluded?

For the reasons noted above, the general rule of leaving integrated acts intact should be carefully observed.

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Land Use and Conservation provisions relating to conservation easements, open space, and agricultural preservation could usefully be consolidated with provisions relating to real property interests generally, such as are found in the Civil Code with respect to powers of termination, covenants running with the land, etc. A wide range of these statutes, not exclusively available for conservation or environmental purposes, are utilized by practitioners and organizations involved in conservation and they are already disorganized. Since not all of these are strictly environmental laws, it might be more useful to consolidate the conservation provisions with other real property statutes in the Civil Code.

The possible exclusion of general land use planning and zoning statutes from other more specifically "environmental" provisions relevant to development projects would not appear to serve the purpose of making the body of law more accessible and usable. At the same time, as your outline discussion notes, this is an extensive body of law not exclusively "environmental" in character. This is a fairly obvious example of the difficult choices we think the consolidation project will face in numerous, small ways not so immediately apparent. It is difficult to assess in general, and in the abstract, what the consequences of either choice may be.

With regard to matters directly pertinent to the work of the Conservancy and similar state agencies, the Commission should consider the disposition or consolidation of a body of statutes relating to funding for park, open space and wildlife conservation. Currently, numerous general obligation bond authorizations for these purposes occur variously throughout the Public Resources Code, Fish and Game Code, and perhaps elsewhere; the California Wildlife Protection Act of 1990, which currently funds significant activities by the Department of Parks and Recreation, Wildlife Conservation Board, and various conservancies, is found in the Fish and Game Code; while other funding statutes, such as the Kapiloff Land Bank Act, which makes funding available exclusively to the State Lands Commission, are an integral part of the functioning of a specific agency they serve.

(4) Are you willing to review drafts or otherwise assist in the preparation of a new code or statutory consolidation?

We are very interested in reviewing drafts and keeping informed of this project as it progresses. We would be willing to comment on specific proposals and possibly be of other assistance, depending on the direction and content of the project as it develops.

Sincerely,



Marcia Grimm  
Senior Staff Counsel

LAW OFFICE OF  
**J. WILLIAM YEATES**  
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J. WILLIAM YEATES

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November 19, 1997

**Sent Via Facsimile & U. S. Mail**

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4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
Fax No. (650) 494-1827

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RE: Environmental Law Consolidation

File: \_\_\_\_\_

To Whom it May Concern

The following are my responses to the questions posed by the Commission regarding the Environmental Law Consolidation project. My overall conclusion after reading the proposal and reviewing the outline is that the project should not go forward as proposed. A more narrowly focused effort would be preferable.

(1) Although I respect the intended purpose of this project, is it necessary and will it accomplish its purpose? It seems to me the Commission has answered this question, by saying "no particular organization is perfect." So then, why undertake this effort?

Upon reviewing the draft outline, it would appear that the project will merely reorganize various environmental and land use laws and place them in another jacket or cover titled California Environmental Code. Would a future practitioner need a statutory cite translator, when referring to judicial decisions that predate this re-organization? This would actually cause more, not less work for those who use the code and rely on case law precedents in their practice.

(2) The concept may be sound, but, again, is it necessary? Is it any more difficult to find a statutory provision of the Subdivision Map Act in the Government Code, than in a new Environmental Code? If one of the goals is to make it easier for environmental lawyers to find the law, I am not sure the re-learning required by a transition from the old codes to the new is worth the trouble.

Consolidating statutes within existing codes may be very useful. For example, it is frustrating to

discover statutory exemptions to the California Environmental Quality Act, which is within the Public Resources Code, within the Government or Health and Safety Codes.

(3) Although I am skeptical about the merits of this project, it would seem that CEQA and the land use statutes (Planning and Zoning Law, Coastal Act, Williamson Act, Endangered Species Act and related habitat conservation statutes) should be consolidated into a division, or two side-by-side divisions, of the Environmental Code. However, this organization may reflect a bias based on my particular practice. For it makes equal sense to have CEQA in the first division, despite the current organization that buries CEQA with all the bureaucratic provisions. (I believe Items 1 through 5 of proposed Division 1 should remain in their respective Government Code or Health and Safety Code provisions.)

Breaking up the Fish and Game Code would also be beneficial. The hunting and fishing regulations should be consolidated, but statutes like the California Endangered Species Act and Natural Community Conservation Planning Act should be freed of their fish and game nomenclature and moved more closely to the planning and zoning law.

(4) If the project proceeds, I would be willing to review drafts and make comments.

Thank you for taking my comments into consideration.

Sincerely,



J. William Yeates



## THE BAR ASSOCIATION OF SAN FRANCISCO

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November 19, 1997

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4000 Middlefield Road, Room D-1  
Palo Alto, California 94303-4739RE: Request for Comment from the California Law Revision  
Commission Re Environmental Law Consolidation

Dear Sirs/Madams:

The California Law Revision Commission has made a request for public comments with respect to a proposal to consolidate various environmental law statutes within a single code. The following comments are submitted on behalf of the Bar Association of San Francisco ("BASF").

- (1) Is the project to consolidate the state's environmental laws desirable? Please bear in mind that a statutory consolidation will require substantial renumbering of essentially all existing environmental statutes.

Comment: The BASF believes that it is desirable to consolidate the State's environmental laws if the consolidation results in a comprehensive consolidation of environmental statutes. We believe that the consolidation is desirable because current environmental statutes are divided among more than a dozen codes. Consolidation would provide for greater clarity and enable practitioners and the public to find the law with greater ease. We recommend that the Environmental Code be accompanied by an index of the laws as they formerly were codified and that the Legislature declare that all new laws pertaining to these subjects be placed in the Environmental Code.

(2) Is the concept of a comprehensive Environmental Code sound? Are there preferable alternatives, such as consolidating statutes within existing codes?

Comment: BASF believes that the concept of a comprehensive Environmental Code is sound and is preferable to the consolidation of statutes within existing codes. Consolidation of statutes within existing codes would not address the issue of environmental statutes being dispersed throughout the California codes and the issue of overlapping and inconsistent provisions.

(3) Are the organization and contents of the Environmental Code as outlined correct? What specific categories or statutes would you include or exclude?

Comment: The general organization and contents of the Environmental Code as outlined appear to be correct. Some members of the BASF are of the opinion that the Toxic and Hazardous Substances provisions should be followed by the Solid and Hazardous Waste provisions.

(4) Are you willing to review drafts or otherwise assist in the preparation of a new code or a statutory consolidation of this type?

Comment: The BASF is willing to review drafts and assist in the preparation of a new code or statutory consolidation.

Very truly yours,



Jeffrey S. Ross  
President

ENVIRONMENTAL LAW SECTION  
THE STATE BAR OF CALIFORNIA



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November 19, 1997

Nathaniel Sterling, Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

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Re: Environmental Law Reorganization

Dear Mr. Sterling:

The following are the preliminary comments of the State Bar of California, Environmental Law Section, Executive Committee ("Committee"), regarding the California Law Revision Commission's proposal to reorganize California environmental quality and natural resources statutes pursuant to the direction of the Legislature. We understand that the Commission's work on this project is in its initial stages.

The Environmental Law Section is composed of private, academic and governmental attorneys specializing in and representing clients from all points of view in the field of environmental law. Through the Section's Executive and Legislation Committees, the Section regularly examines proposed environmental legislation to help ensure that the legislation is clear, consistent with applicable statutes and constitutional provisions, and drafted in a manner that will achieve its purpose. Commenting on legislative and administrative proposals is within the purview of the Environmental Law Section, in particular, when such proposals will have a significant effect on the field of environmental law, require the special expertise of our Section, or will promote clarity, consistency or comprehensiveness of the law.

An ad hoc subcommittee of the Environmental Law Section's Executive Committee has reviewed the September 2, 1997 report by the Commission's consultants, Professors Dwyer and Gray, and one of our members attended the Commission's September 11, 1997 meeting in San Diego. The members of this ad hoc committee are Section members who have extensive experience in a wide variety of environmental law fields and practices. As discussed below, it is the Executive Committee's current intent

that our Section continue to be involved in reviewing and commenting on the environmental law reorganization project as proposals are developed by the Commission.

In general, it is the opinion of the Executive Committee that a well executed project could improve the use by practitioners, regulators and the public of environmental quality and natural resources statutes. The Committee has not reached the consensus necessary to provide firm recommendations to the Commission regarding the structure or course of the project. The Executive Committee also recognizes that a project to consolidate environmental statutes faces significant obstacles because efforts to reconcile differences in scope, applicability or approach among statutes may involve policy choices outside the Commission's purview. As the Commission's staff and consultants already have pointed out, there are several potential approaches to this project. Each of these distinct approaches has its own advantages as well as logistical, legal and political difficulties. The nature of our Committee's continued involvement depends on the general direction that the Commission elects to pursue.

The remainder of this letter presents the Committee's initial comments on the project. It also describes potential roles for our Committee in the Commission's ongoing efforts to effect environmental law reorganization.

## DISCUSSION

A number of important issues must be considered in designing and executing this project. The Commission's consultants raised several of these issues in their September 2, 1997 report. The Committee offers the following comments on these issues, and also raises, below, additional issues that should be considered by the Commission.

### **I. Which Statutory Provisions Should be Included in an Environmental Code?**

The Commission must consider which provisions constitute "environmental quality and natural resources" laws. While some laws obviously fit within this definition, others, arguably, could be either included or excluded. One example of this ambiguity are the land use and planning laws in the Government Code. Another example is the current commingling of environmental with public health and safety issues in the regulation of chemical use and disposal in the Health and Safety Code. Recent efforts to merge environmental, civil rights and socio-economic issues under the rubric of "environmental justice" may produce another set of concerns about the scope of environmental laws.

The consultants' report raises this issue, and provides several examples of their initial efforts to determine which provisions to include in an Environmental Code.

## **II. Will Consolidation of Environmental Laws Fragment Other Provisions?**

The present scattering of "environmental quality and natural resources" provisions throughout the California Codes is in large part reflective of the distribution of environmental responsibilities among hundreds of state and local agencies, whose primary or incidental environmental responsibilities often are codified in the organic statutes creating these agencies. Some agencies have predominantly environmental responsibilities (e.g., State Air Resources Board, State Water Resources Control Board), while others have been assigned limited environmental functions that are incidental to their main missions (e.g., California Highway Patrol, Department of Health Services).

Efforts to draw together "environmental quality and natural resources" provisions might require the Commission to disassemble statutes now organized according to agency jurisdiction. The consultants' report identifies several examples of this potential effect of the project, but does not discuss the problem in the level of detail necessary to determine when and how to disassemble specific provisions of existing codes in order to reassemble them in a new Environmental Code. In doing so, the Commission will need to consider the effect of any such revisions on the source codes, and on the programs they authorize. It is quite possible, for example, that any provision that is not moved to the new Environmental Code may henceforth be interpreted as "non-environmental" regardless of the original intent of the Legislature.

## **III. Which Changes Can be Made Without Compromising Federal Delegation?**

A number of California's environmental quality statutes were either adopted or amended to allow California to be delegated authority by the United States Environmental Protection Agency to implement parallel federal statutes (e.g., Clean Air Act, Clean Water Act, hazardous waste statutes). One of the prerequisites of such delegation is that the state laws be structurally and semantically consistent with the federal environmental statutes and regulations.

Hence, numerous instances of fragmentation, overlap and inconsistency within state laws owe their existence to the structure and language of the parallel federal laws over which the State has no direct control. Some examples include different and inconsistent definitions of hazardous substance/hazardous material, and overlapping

requirements for release prevention programs. Efforts to improve California's statutes could complicate, and might even endanger, the State's continued ability to maintain federal delegation.

The consultants' draft does not raise directly the issue of federal consistency, but this issue must be addressed as a part of any consolidation effort.

**IV. Which Obsolete, Redundant, and/or Inconsistent Provisions Nonetheless Serve the Needs of Some Interested Parties and Should be Retained?**

Most practitioners of environmental law can name statutory provisions that appear to be obsolete, or are redundant, vague or ambiguous, and lead to confusion in implementation. In spite of these apparent flaws, the provisions are may be frequently used and relied upon by various parties to increase flexibility or derive advantages. While the Commission's task excludes policy changes, any effort to eliminate these troublesome provisions must include attention to the underlying purposes that these incongruities in the law have come to serve. Thus, when such provisions are identified, it would appear to be consistent with the Commission's task to highlight them in reports to the Legislature, which then could determine whether to amend or otherwise change the highlighted provisions.

**V. How Might an Environmental Code be Structured?**

Once the Commission determines which provisions to include in an Environmental Code, it will be necessary to organize these provisions in some logical, accessible and useable order. The consultants' draft presents a good start to this process, although individuals among the Section members who helped develop these comments had widely divergent opinions about the best organizational scheme. These differences included issues such as whether to create a separate code-wide definitions section, how to divide the Water Code, and whether and to what extent a statute enacted by initiative (e.g., Proposition 65) can be reorganized.

**VI. Would an Environmental Index Provide a Useful Adjunct to or Substitute for a Reorganization?**

The Commission's consultants have suggested that an alternative to statutory reorganization would be the development of a detailed index of existing statutes. It is the Committee's opinion that a well-executed and scrupulously maintained index would be of substantial value to environmental law practitioners, regulators and the public.

The Committee cannot determine at this time, however, how such an index would improve on commercially published indices. One advantage of preparing an index instead of a complete consolidation of environmental statutes is that it would allow the Commission to focus on a few areas where the need for revision is greatest. A complete consolidation poses a greater risk of failure if the project turned out to be unwieldy or overly controversial.

#### **VII. Environmental Law Section's Interest and Potential Participation**

The Committee recognizes that environmental attorneys, regulators and the public would benefit from a well-executed reorganization of the codes, identification of issues that can be referred to the Legislature for future action, and/or creation of an index of environmental laws as presently codified. Accordingly, the Committee supports the goals contemplated in this project, although our members remain concerned about the feasibility of an ambitious reorganization project.

It appears from the materials made available for comment that the Commission has not yet determined a definitive direction for the project. Accordingly, the Committee cannot make detailed recommendations or a firm commitment to participate. Furthermore, in discussing possible approaches to participation, the Committee has not reached the consensus necessary to recommend which alternative the Commission should select. Nevertheless, based on the Section's considerable experience in reviewing and evaluating legislation and legislative proposals, the Committee contemplates being able to offer the following support to the Commission's efforts, if desired by the Commission:

- Soliciting and organizing volunteers from within Section membership who have expertise in specific areas of environmental law to respond to draft materials developed by the Commission's consultants, suggest areas of inquiry, and make specific recommendations.
- Providing a structure for organizing review, comment and recommendations by Section members, perhaps through establishing a standing subcommittee, to help the Commission and its consultants respond to Section input.

Nathaniel Sterling  
November 19, 1997  
Page 6

Thank you for this opportunity to review and comment on the Commission's proposal to reorganize the state's environmental quality and natural resources statutes. The Environmental Law Section, Executive Committee hopes that these comments will be of assistance, and will be glad to respond to any questions.

Very truly yours,



ELLEN J. GARBER  
JON F. ELLIOT  
Executive Committee Advisors

EJG:ad

cc: Richard Tom, Chair, Executive Committee  
Mark Klaiman, Vice-Chair, Executive Committee  
Bruce Klafter, Chair, Legislation Committee  
Andy Sawyer, Executive Committee Advisor  
Michael Remy, Executive Committee Member  
Michael Zischke, Executive Committee Member  
Larry Doyle, Chief Legislative Counsel

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## DEPARTMENT OF HEALTH SERVICES

714/744 P STREET  
P.O. BOX 942732  
SACRAMENTO, CA 94234-7320  
(916) 654-0589



November 19, 1997

Mr. Nathaniel Sterling  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

Thank you for the opportunity to review and comment on the proposed draft outline of the "California Environmental Code."

While we believe that the creation of an environmental code may be beneficial, the Department of Health Services (Department) is opposed to including any portions of the California Health and Safety Code (HS&C) in the draft code. The portions of the HS&C proposed for inclusion contain authorities for public health programs and disciplines participating in such programs. These are closely tied to the mission of the Department to protect the public health. The fragmentation of the HS&C into an environmental code will diminish the Department's effectiveness in delivering high quality public health services to California's residents and visitors.

Should you have questions, please contact David P. Spath, Ph.D., P.E., Chief, Division of Drinking Water and Environmental Management, at (916) 322-2308.

Sincerely

A handwritten signature in black ink that reads "John R. Pierson".

John R. Pierson  
Deputy Director and  
Chief Counsel  
Office of Legal Services

## DEPARTMENT OF FISH AND GAME

1416 NINTH STREET  
P. O. BOX 944209  
SACRAMENTO, CA 94244-2090  
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November 19, 1997

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California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, California 94303-4739

Dear Sirs:

**Proposed Environmental Law Consolidation Comments**

Attached is the Department of Fish and Game's Office of Oil Spill Prevention and Response (OSPR) Legal Unit's comments to the proposed environmental law consolidation dated September, 1997. These comments are the opinion of the draftsman and are not intended to reflect the opinions of the Department of Fish and Game, its General Counsel's Office, or the OSPR Administrator.

If you have any questions or comments, please feel free to call me directly at telephone number (916) 324-3404.

Sincerely,

A handwritten signature in cursive script that reads "Harold M. Thomas".

Harold M. Thomas  
Staff Counsel III  
Office of Oil Spill Prevention  
and Response

Attachment

**Public Comment on the California Law Revision Commission's  
Proposed Environmental Law Consolidation**

**I. Question: Is the project to consolidate the state's environmental laws desirable?**

Any answer to this question requires a review of the underlying assumptions supporting the legislature's request to the California Law Revision Commission (CLRC). (See page 1, lines 2-5.) One assumption appears that there are "obsolete and unnecessarily duplicative statutes" now in the Codes. A second assumption is that inconsistencies between "environmental" statutes are inappropriate or improper. Thirdly, the request appears to assume that simplification and consolidation of environmental statutes is a positive change in the law. Lastly, the introduction assumes that it is possible to simplify and consolidate statutes without engaging in a policy revision. I would challenge each of the above assumptions.

**Obsolete and unnecessarily duplicative:**

Each environmental law, whether drafted in 1915 to protect the groundwater of the San Joaquin Valley or revised in 1996 to reduce the scope of the states 1915 oil pollution prohibition, is a carefully crafted and politically balanced enactment. Each enactment is responsive to the social and environmental conditions of the time, and each enactment is defined by the legal and institutional practices that existed prior to the enactment. The decision that a law is obsolete is a legal and political question reserved for the legislature, and is not the jurisdiction of an appointed commission. The conclusion that an environmental law is obsolete is an opinion only as valid as the arguments and biases of the opinion holder.

An example of subjective environmental opinions was evidenced in the multi-year effort by the California Chamber of Commerce to "reform" California's zero tolerance water pollution law. The Chamber, on behalf of the wood preservative industry, argued beginning in 1992 that the statutory ban on discharging the preservative creosote was an obsolete law dating from the turn of the century. The Solano County District Attorney did not share the wood preservative industry's view that creosote, proven in studies to be a toxicologically deleterious material, was an appropriate additive to state waters and subsequently prosecuted a state wildlife official for authorizing its use in a drinking water supply. The District Attorney's actions showed there was no community consensus, except perhaps among industrial dischargers, that the existing water pollution laws were obsolete or duplicative. The CLRC is not an appropriate body to judge which environmental laws are "obsolete or duplicative". It is the legislature's duty to consider these questions.

The CLRC's standard for rendering a law obsolete is undefined and untested. A legal change of basic public health, safety, and welfare laws should not rest on untested or unarticulated standards.

**Inconsistencies between environmental statutes should be "resolved":**

If one starts from the premise that the legislature and the interest groups that participate in legislative development are adequate representatives of the people, one must ask if an apparent drafting "inconsistency" is a legislative evil or defect that should be "resolved". It is my experience, after drafting and commenting upon laws during a ten year period, that

inconsistencies are generally the result of intentional and knowing legislative compromise. In many cases, what appears to be "inconsistency" to the occasional practitioner, is in fact careful drafting based on a thorough understanding of the relevant codes.

An example of this phenomenon is the 1949 legislation that created the Dickey Water Pollution Act (DWPA). The 1949 enactment explicitly preserved an apparent contradictory provision of Fish and Game Code section 5650. Casual observers might believe that the DWPA authorized pollution from municipal and industrial sources. However, the the 1949 legislature did not repeal the preexisting prohibition on industrial pollution discharges. I believe this "inconsistency" was the result of a careful compromise that preserved the Fish and Game Code based prohibitions on discharges deleterious to wildlife, while permitting some municipal source pollution, when "assimilative capacity" existed in the receiving waters. If this careful balancing of legal standards is the type of "inconsistency" that will be "reformed" by the CLRC, one must question the validity of the reform effort.

The logic of the 1949 legislative compromise may have been lost in the mists of time or, subsequently, misconstrued by those that did not agree with the enactment. The legislature did, however, revise the state's water quality laws in 1949 by enacting what is today Fish and Game Code section 5651, which provided that "continuing and chronic" pollution would be regulated by the Regional Water Quality Control Boards created by the DWPA, and the Department of Fish and Game would continue to prohibit and prosecute industrial discharges. This important, but arcane legal history, could well be overlooked in an effort to root out "inconsistent" legislative schemes.

The CLRC is not the appropriate entity to attempt to resolve "inconsistencies" that may in all likelihood be the basis of carefully drawn compromise between business and community interests.

#### **Simplification and Consolidation of Environmental Statutes:**

Laws regulating economic and social behavior in order to protect the environment are complex because the behavior being modified is complex. So to are the factual determinations of environmental standards and quality, both complex and interrelated. Any effort to "simplify or consolidate" existing environmental law will create a ripple effect through related codes and laws and merely relocate the complexity of environmental regulation to other areas of administrative or regulatory practice.

An illustration of this factual and legal complexity emerges when one considers water transfers. Under the Water and Civil Codes, certain property entitlements are assumed to attach to water rights claimed for beneficial use. Water right holders have environmental duties including, the requirement that they pass sufficient water over the dam to keep fish in good condition, the requirement that holders not obstruct rivers and streams without providing for fish passage, and that they not kill fish when the diverter pumps water from rivers into their fields. Water right holders have equitable and economic duties to downstream property owners including the duty not to harm a downstream diverter by unreasonable or unpermitted diversion of waters. Yet water rights holders may transfer the water right by selling their water and transferring the right to divert and use water to another location potentially far away in place and time from the historic point and method of use.

Are water transfers complex and inconsistent with the balance of the various environmental protection statutes? Despite the occasional simple and uncomplicated water rights transfer, the answer in most fact patterns is affirmative. I do not believe there is a legislative draftsman that can "simplify or consolidate" the law of water rights transfers without impairing some of the now protected downstream diverters or fish and wildlife interests that rely on appropriately timed instream flow. It is a biological reality that fish live in the transit water flowing between users.

The facts of many environmental conflicts suggest simplification in this area of law will reallocate societal protection of some now protected important environmental or economic interests. History suggests that "simplification" will permit economic interests to gain at the expense of fish and wildlife.

**II. Question: Is the concept of a comprehensive Environmental Code sound?**

In my general opinion, the concept of a unified and comprehensive environmental code is inappropriate as a policy matter and intellectually unsustainable. The primary argument behind this opinion is the variance in the intellectual understandings that lie behind the concept or term "environment".

There are at least two major divisions in the community of interests that work with the law of the "environment". The first of these is the largest group that considers and defines environment to be the human use of the environment. The law of timber harvest, water use, power, agriculture, mining, and urban development all primarily focus on how to use the products of the environment in a way to sustain economic activity while minimizing adverse impact to the resources being used. One might observe that the growing list of endangered species speaks to our success in environmental use and the corresponding failure of environmental conservation and protection.

The smaller group of interests works with the law of natural resource protection. These agencies and organizations focus on parks and wildlife. The law of natural resource protection is primarily based on the social and philosophical decision to preserve and protect natural systems for their innate value, be it spiritual, scientific, or intellectual. The subtext of the preservation laws has been the promotion of recreational and consumptive use of park lands, fish, and wildlife. However, the philosophical orientation of these laws is preservation first and conservation second. Conversely, the subtext of the earlier natural resource use law was the protection and wise use of natural resource under the progressive era "conservation" legal doctrine. One might query if the traditional conservation doctrines still exist in the modern application of natural resource use law and practices.

Water quality laws attempt to straddle the preservation vs. use conflict. These laws incorporate both protection and use concepts in a single Water Code. This doctrinal straddle occurred in the late 1950s when the fishery preservation supply requirements came into conflict with the water use community's perceived needs for municipal and industrial supply. It was not until 1959 (Statutes of 1959, ch. 2048) that use of water for fish became recognized as a valid use under the water rights legal system. The legal "reform" that balanced fish preservation with municipal and agricultural use of water codified a mutually inconsistent mission. Water diverted for beneficial use in the fields is not available for instream uses notwithstanding the legislative desire to balance competing interests. One might speculate the legal conflict inherent within the

Water Code and the public desire to see the preservation of aquatic life may explain the continuing legal conflicts known colloquially as California's environmental "water wars".

Any legal "reform" efforts that seek to create a single body of law must attempt to reconcile the innate conflicts between preserving California's parks, fish, and wildlife, and use of resources which, by use, renders lands and waters unfit for parks, fish, and wildlife. As a factual matter, laws which give priority to logging of coastal redwoods will by practice render the streams of the coastal forest less fit or likely unfit for salmon and steelhead fisheries. No amount of legal drafting can unify definitions of the term environment which seeks to promote the mutually inconsistent goals of fishery preservation and timber harvest. Each legal objective cannot coexist in a single intellectually consistent law code. The debate over which idea will prevail in law or practice should not be carried out in the CLRC process, but rather in the legislature.

**Preferable alternative:**

There may be limited opportunities to clarify and, in some part, consolidate intellectually consistent statutes within existing codes. An example of a intellectually consistent simplification would be to return the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act to the Fish and Game Code where the remainder of the fish and wildlife based water pollution laws are located. Oil pollution has been regulated within the Fish and Game Code since 1915, and the marine oil pollution program should be integrated into the Fish and Game Code. In addition, river and stream protection statutes occur as ancillary protections in such diverse economic activities as timber harvest, gravel mining, and highway construction. These statutes should logically be consolidated in the Fish and Game Code and cross-referenced in corresponding code sections. If an economic activity is sufficiently disruptive to fish and wildlife and its habitat to warrant protections or modifications to the manner of carrying out the economic activity, those protections should be grouped within a single location in the Fish and Game Code.

**III. Question: Are the organization and contents of the Code as outlined correct?**

Many of my general comments regarding the proposed reorganization are found above. The comments below are intended to focus on issues of particular interest to those concerned with fish and wildlife preservation and enhancement.

**Division I General**

The structure of this proposed section appears to assume that environmental and natural resource agencies are managed exclusively by either the Resources Agency or the California Environmental Protection Agency (Cal-EPA) when, in fact, the picture is considerably more complex. The basic governance structure for environmental agencies does not generally reside at an agency level, but is found in a variety of independent or administratively autonomous functional entities.

An example is the California Fish and Game Commission, which is an entity created by constitutional enactment in 1909. The Fish and Game Commission was legislatively granted considerable direct authority over the consumption, take, or destruction of fish and wildlife. The Fish and Game Commission also exercises derivative authority or influence over the water, timber, and habitat where fish and wildlife are found. The Wildlife Conservation Board has a variety of special habitat preservation and acquisition duties. Other legislatively created entities,

such as the Board of Forestry, have considerable authority over timber harvest practices and the fish and wildlife that depend upon forests for their continued existence. In another example, the State Water Resources Control Board has in practice, near absolute authority over the continued existence of fish species through its control of water rights. The above are examples of the many agencies with control over fish and wildlife interests.

What the commentator characterizes in the alternative view as subunits of the Agencies are not legally units or subdivisions of the agency structure, but, in fact, are semi-autonomous or independent entities merely housed within the Resource Agency or Cal-EPA. This seemingly complex management structure is actually an efficient division of labor between natural resource use, regulatory agencies, and those agencies with preservation purposes or functions.

### **Division 3 Water Resources**

The CLRC's proposal revises the law of fishery preservation and moves significant fishery preservation law, including in stream flow requirements, fish passage, and fish screening issues, into the water resources domain. Fisheries advocates have struggled with hydroelectric developers, dam builders and irrigators for over one hundred (100) years to keep the law protecting fisheries independent from the control of water resources administrators and water committees of the legislature. As drafted, this proposal will accomplish an adverse change of jurisdiction in law without public debate or recognition. The CLRC should proceed with great caution before proposing to change the shared jurisdiction over rivers and streams to the exclusive or general jurisdiction of the water resources community.

On its own merit, the merger of fisheries protection into water resources law has no historical basis or modern day rationale. The interest groups that use water consumptively have no rational economic basis in maintaining water allocations for fisheries or other nonconsumptive uses. To give exclusive legal control over fisheries water to users and consumers of water, is to hasten the extinction of salmon, steelhead trout, and other native fisheries.

Similarly, the municipal and industrial irrigators have since the 1920s, sought to submerge the pollution prohibitions of the fish and game pollution laws (Fish and Game Code sections 5650-5655) within the water pollution provisions of the Water Code. This issue was legislated in 1949, 1969, and in both 1996 and 1997. The legislature has clearly debated and preserved the pollution laws that protect the quality of water for fish, birds, plants, and animals and distinguished those laws from the human use focus of the DWPA and its successor, the Porter Cologne Water Quality Control Act. The alternative suggestion is to consolidate the pollution laws that protect fish and wildlife into the Fish and Game Code and avoid transferring jurisdiction to the Water Code or to the administration of an agency whose genesis was the use and diversion of water resources.

### **Division 4 Toxic and Hazardous Substances Act**

The CLRC proposes to consolidate the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act into the portion of the environmental code that concerns itself with toxic substances. This consolidation is ill considered as other important, but related oil pollution regulatory prohibitions, are extant in other codes. The current prohibitions on oil discharge are proposed for transfer to the Water Code from the Fish and Game Code where they have been located since the early part of the century. What is the logic by which the CLRC would place

marine oil pollution prevention and enforcement into the Toxic and Hazardous Substances Act, and an inland oil pollution prohibition into the Water Code. Why not leave the protection of wildlife from oil pollution in the Fish and Game Code, where it has been since 1915, and consolidate the historically inconsistent Lempert-Keene-Seastrand Oil Spill and Response Act into existing law within the Fish and Game Code?

The Lempert-Keene-Seastrand Oil Spill and Response Act is currently drawn to protect fish and wildlife and is an office located within the Department of Fish and Game. The Department of Fish and Game has sworn law enforcement personnel, and neither the State Water Resources Control Board nor the Department of Toxic Substances Control has a significant class of sworn investigators. The rationale for a unified Fish and Game Code based on pollution prohibition is particularly strong when considering the comprehensive prohibition of the discharge of hazardous substances effecting human health is already found in Health and Safety Code section 25507. In preserving each law as currently drafted, the pollution laws comprehensively prohibit discharges harmful to both the human and natural world.

**IV. Question: Is the commentator available to review drafts or otherwise assist?**

The OSPR does not have a budget for assisting in statutory consolidation. The work that is proposed impacts the core authorities of the OSPR and the Department of Fish and Game within which the OSPR is located. My availability to engage in drafting and assisting in the preparation of the new Code will be at the discretion of the OSPR's Administrator.



Cal/EPA

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Pete Wilson  
Governor

~~James M. S. [unclear]~~  
Secretary for  
Environmental  
Protection

November 20, 1997

Air Resources  
Board

RE: Proposed Environmental Law Consolidation

Department  
of Pesticide  
Regulation

Thank you for the opportunity to review the Commission's proposed reorganization of California's environmental quality and natural resources statutes. At a minimum, we believe this project will be helpful in identifying, consolidating, and harmonizing duplicative or conflicting environmental laws currently on the books.

Department  
of Toxic  
Substances  
Control

Integrated  
Waste  
Management  
Board

The unification of environmental laws was also considered by a Blue Ribbon Panel known as the Unified Statute Commission, which ultimately decided to limit its recommendations to administrative and regulatory reforms which could be accomplished without statutory revision. A final copy of that Commission's report is attached.

Office of  
Environmental  
Health Hazard  
Assessment

State Water  
Resources  
Control Board

We took the liberty of sharing your proposal with each of the Boards and Departments within Cal/EPA for review. A summary of those comments is attached. Although there is some concern that this effort will actually lead to some confusion and the need for extensive cross-referencing, we believe that the inconvenience of renumbering existing statutes will eventually be outweighed by the long-term benefits of a consolidated and organized environmental code. We also believe that Administratively, we can, and have, accomplished reduction in overlap and duplication in a manner that intersects well with the charge of the Commission.

Regional  
Water Quality  
Control Boards



Recycled Paper

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Again, thank you for the opportunity to comment on this proposal. We are prepared to offer our assistance in accomplishing this task, and would appreciate the opportunity to remain involved in this effort. If you have any addition questions, please do not hesitate to contact Diane Richardson, Cal/EPA's Legislative Director, at (916) 322-7315.

Sincerely,



Peter M. Rooney

Secretary for Environmental Protection

attachments

cc: Mr. Chris Reynolds  
Legislative Director  
Air Resources Board  
2020 L Street  
Sacramento, California 95814

Mr. Tom Jones  
Chief, Legislative and Public Affairs  
State Water Resources Control Board  
901 P Street, 4th Floor  
Sacramento, California 95814

Ms. Patty Zwarts  
Assistant Director, Legislative and External Affairs  
Integrated Waste Management Board  
8800 Cal Center Drive

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Page 3

Sacramento, California 95826

Ms. Patricia Grim  
Legislative Director  
Department of Toxic Substances Control  
400 P Street, Room 4490  
Sacramento, California 95814

cc: Mr. Steven Monk  
Legislative Coordinator  
Department of Pesticide Regulation  
1020 N Street, Suite 199  
Sacramento, California 95814

Ms. Bev Passerello  
Legislative Coordinator  
Office of Environmental Health Hazard Assessment  
301 Capitol Mall, 2nd Floor  
Sacramento, California 95814

**Attachment 1**  
**Comments from Cal/EPA Boards and Departments**

- The existing statutes governing California's pesticide regulatory program are contained in Divisions 6, 7 and 13 of the Food and Agriculture Code (FAC). The Commission's document states that "for the most part, Divisions 6 and 7 of the FAC are transferred wholesale..." Based on this statement, we are not clear which portions would and which portions would not be transferred.
- "Certification" under Division 1 of the proposed Environmental Code may be misleading to the regulated public. For example, the Department of Pesticide Regulations "certifies" pesticide applicators; however, those provisions will not be found in Division 1 of the proposed code. The Commission may wish to consider a more descriptive title for this section.
- The proposal places sections 105200-105225 of the Health and Safety Code into the new Division 5. As the Department of Pesticide Regulation is not responsible for administration of these sections, the Commission may wish to consider adding additional language to expressly indicate who has responsibility for these duties.
- Proposed Division 5 should also include FAC Chapter 7, sections 15201-15206.6 (Structural Pest Control), FAC Article 6, section 290-80-29-82, and FAC Article 7 section 29100-29103 (Bees and Pesticides).
- In addition to statutes contained in the FAC, the Department of Pesticide Regulation is governed by various statutes contained in the Business and Professions Code and the Health and Safety Code. The Commission should consider including the following statutes in Division 5 of the proposed Environmental Code:
  - Business and Professions Code, Division 3, Chapter 14, sections 8500-8698.3;

- Health and Safety Code Sections: 2200-2202; 2800-2805; 25197-25197.3; 25207-25207.13; 63222; 100575; 100825-100915; 106925; 109875-110040; 110045-100135; 110245-110285; 110425-110475; 110460-110495; 110545-110655; 113090; and 116185-116225.
- Separate the solid and hazardous waste codes.
- Expand the solid waste section to include Public Resources Code section 5600; and 4900-49620.
- The outline incorrectly lists the code sections in Part 5 of Division 26 of the Health and Safety Code as sections 39000-39153. The correct reference is 43000-44251.
- The benefits of consolidation and clarification cannot be achieved simply by moving and renumbering the statutes. Even the apparently innocuous decision as to which statutes to place in a specific division of the new Environmental Code may reflect policy choices and could have significant legal consequences. The context or placement of a statute may also affect its interpretation. For example, whether a particular statute is categorized as a "water resource" or "wetlands protection" statute may influence how the courts interpret it, even though the two areas overlap. Thus an obvious effect of changing where a statute is codified is the change of applicable definitions. There is some concern that any change would require the need for a continual cross-reference system. Any benefit achieved in being able to "find" a specific law nearer similar subject matter may be outweighed by the on-going need to cross-reference existing case law, regulations, and secondary sources.



# CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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November 21, 1997

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LAWRENCE G. BROWN

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, California 94303-4739

Dear Law Revision Commission:

Re: Proposed Environmental Law Consolidation Draft

The California District Attorneys Association is a nonprofit association of California's 58 elected district attorneys and approximately 2,400 deputy district attorneys. As an organization whose members are involved on a day to day basis with enforcing laws enacted to protect public health and safety, CDAA has a substantial interest in how these laws are enacted, revised, and interpreted. In particular, CDAA members prosecute a wide number of criminal and civil statutes related to environmental protection, all of which could be affected by any consolidation or revision.

CDAA is concerned that the proposals, under the guise of simplification and reorganization, could in fact have deleterious consequences to environmental enforcement.

The comments that follow are far too brief to do justice to the work which has been done by the Commission. We are, however, willing to devote more effort to the process, and in particular, would like to participate in further reviews as suggested in the Commission's fourth question.

Four questions were posed in the draft.

1. Is the project to consolidate the state's environmental laws desirable?

Not necessarily. Commercially available publications now exist which consolidate the statutes into a single volume, and able commentary exists that explains the interrelationships between the statutes. It might be argued that a significant and laudable goal of consolidation is to make it easier for environmental legal practitioners and the public to feel confident that one can have all environmental laws in a single volume without possessing specialized

knowledge of where to find "hidden environmental statutes" in arcane codes. However, we are not convinced that this will eliminate the need for specialized knowledge. For example, Health and Safety Code section 11374.5 provides penalties for the disposal of hazardous substances by a manufacturer of controlled substances, and provides specific directions where penalty monies should go to clean up environmental contamination. If this section were moved to a new environmental code, it would no longer be grouped with statutes which criminalize drug manufacturing crimes, and could be missed by a prosecutor with limited training in environmental enforcement. We cite this only by way of example, not to suggest that prosecutors and other lawyers cannot or should not be well-versed in the statutes they enforce. The point is that consolidation is not a certain path to better legal practice.

Other unintended consequences could result from consolidation. For example, Section 5650 of the Fish and Game Code prohibits one from depositing, permitting to pass into, or placing where it can pass into waters of the state, any material deleterious to fish, plant life, or bird life. Moving this section to a consolidated water quality section of a proposed environmental code would immediately raise the question as to what agency would be primary enforcement jurisdiction. Would it be the Department of Fish and Game, which now has this authority, or would it fall to the State Water Resources Control Board, which enforces other significant water pollution statutes? The effect on environmental quality could be significant, since the Department of Fish and Game enforces a zero-tolerance pollution statute designed to protect sensitive fish and wildlife, whereas the Water Boards have historically been more concerned with balancing often competing "beneficial uses" of water resources, enforced through drinking water standards. Drinking water standards allow levels of chlorine which fish cannot tolerate.

2. Is the concept of a comprehensive environmental code sound?

Not if produced by a commission without legislative powers, if by "comprehensive environmental code" one means a code that has no apparent inconsistencies or any provisions which, if not harmonized with other provisions, would produce apparently inconsistent results.

California's environmental statutes have been written piecemeal over a period exceeding one hundred years. One of the earliest, the previously-mentioned section 5650 of the Fish and Game Code, was originally enacted in the 1870s. Its zero-tolerance for water-based pollutants is arguably inconsistent with other sections of the Water Code, CEQA, or provisions of the Forest Practices Act which, it can be argued, accept environmental degradation and pollution in varying degrees at various levels of mitigation. During the last full legislative session, SB 649 (Costa 1996), as initially proposed, would have required a prosecutor to demonstrate environmental harm before proceeding with a § 5650 prosecution. Proponents argued that statutes enacted since the 1870s adequately regulated polluters, and that the zero-tolerance provisions in § 5650 were either obsolete, unnecessary, or in conflict with other statutes. Proponents also argued that § 5650 was unfairly inconsistent with provisions in the Water Code and other codes which allow

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holders of permits to discharge pollutants into state waters. They proposed that those permit holders be exempt from § 5650's prohibitions. This hotly-debated and controversial measure passed with amendments, and was subsequently modified by AB 11 (Escutia 1997). This legislative process is a perfect example of the complexities involved in updating "obsolete" provisions and harmonizing seemingly inconsistent statutes. Fundamental policy decisions were implicated in what some initially characterized as an innocuous modernization of the Code.

CDAAs believes that many-- and perhaps most-- alignments and "modernizations" will necessarily involve policy choices in the form of options that either strengthen or loosen environmental protection, depending on which option is selected. These are policy choices which are legislative in nature, and should not be made by a committee. A comprehensive environmental statute will probably involve hundreds of such choices, making intelligent legislative debate on an entire package very difficult to achieve.

3. Are the organization and contents of the code as outlined correct?

We have no comments to offer at this time on this subject.

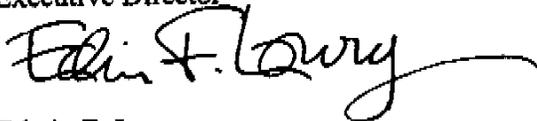
4. Is the commentator available to review drafts or otherwise assist?

Yes.

Thank you for the opportunity to comment on the draft outline.

Very truly yours,

Lawrence G. Brown  
Executive Director



Edwin F. Lowry  
Director, Environmental Project

EFL/jkc

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**Via Fax: 650-494-1827**

California Law Revision Commission  
400 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Re:Environmental Law Consolidation

To Whom It May Concern:

I have briefly reviewed the Request for Public Comment (having received it this only this week) and submit the following comments.

A reorganization of the environmental statutes, currently scattered throughout several codes, has the potential to simplify my efforts to advise the City in both its roles as regulated entity and regulator. The revision and reorganization process would highlight some of the overlapping and occasionally conflicting provisions (including overlapping jurisdiction of state agencies) as well.

The organization proposed seems well thought out; however, **fees related to environmental issues should be included in a new environmental code.** The addition of relatively few pages is preferable to having to refer to another code for those items; I personally almost never have any other reason to consult the Revenue and Taxation Code, and I would venture to guess that the same is true for most attorneys who devote all or a large part of their practices to environmental issues.

I would be willing to assist in the revision process, depending on the time commitment involved. Please contact me at the above address.

Very truly yours,

JOHN R. CALHOUN, City Attorney

By   
LISA PESKAY MALMSTEN  
Deputy City Attorney

LPM:et



*Natural Resources  
Defense Council*

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November 21, 1997

BY FAX -- (650) 494-1827

Nathaniel Sterling  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road  
Room D-1  
Palo Alto, CA 94303-4739

Re: Comments Regarding Proposed Environmental Law Consolidation

Dear Mr. Sterling and Members of the Commission:

I learned only yesterday of the proposed project on consolidation of California's environmental laws. As a member for the past several years of Governor Wilson's Unified Environmental Statute Commission, I wanted to bring to your attention the fact that a review of this very issue has been undertaken and recommendations made by the Governor's Commission as reflected in its voluminous final report, issued earlier this year.

Based on that parallel effort, and because I have not had an opportunity to review the Law Revision Commission's proposal, I am writing to request an extension of 30 days in which to review it and submit comments on behalf of the Natural Resources Defense Council ("NRDC"). Given the recent recommendations of the Governor's Commission, we may oppose the proposed environmental law consolidation project, but I believe a review of the specific proposal is required before NRDC renders an opinion one way or the other.

Thank you very much for your consideration of this request.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Joel R. Reynolds', written over a horizontal line.

Joel R. Reynolds